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In the Supreme Court of the United States

OCTOBER TERM, 1979

GEORGE BOYLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in omitting jury instructions to the effect that petitioner's receipt of payments from several construction companies during a period in which he served as business manager of a labor organization representing employees of those companies could not be found to have violated 29 U.S.C. 186(b)(1) unless it was shown that he took such payments willfully and in exchange for productive labor and labor peace.

2. Whether the district court improperly denied petitioner an evidentiary hearing on his contention that certain records were obtained by the IRS in violation of the good faith requirements set out in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 through A-7) is at 620 F.2d 359.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1980. The petition for a writ of certiorari was filed on May 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on ten counts of an eleven-count indictment and on a consolidated one-count indictment. Specifically he was convicted of conducting the affairs of a union local through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 1); receiving illegal payments, in violation of 29 U.S.C. 186(b)(1) and (a)(4) (Count 2);[1] income tax evasion, in violation of 26 U.S.C. 7201 (Counts 4, 6, 8, 10 and the separate indictment); and filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 5, 7, 9 and 11). He was sentenced to concurrent terms of imprisonment of ten years on the racketeering count, one year on the illegal payments count, five years on each of the income tax evasion counts, and three years on each of the false filing counts. Petitioner was also fined $85,000. The

[1] Petitioner was acquitted on Count 3, which also charged the receipt of illegal payments.

court of appeals affirmed (Pet. App. A-1 through A-7).

The evidence at trial showed that between January 1, 1965, and April 15, 1977, petitioner conducted the affairs of union Local 5[2] through a pattern of racketeering activity by demanding and receiving approximately $1,000,000 in cash payoffs from officers of six different corporations whose employees were represented by Local 5. The evidence also showed that petitioner evaded paying federal income tax on the payoffs for the calendar years 1972 through 1976 and that he filed false federal income tax returns for calendar years 1973 through 1976.

Petitioner was elected business manager of Local 5 in the early 1960s (C.A. App. 104).[3] As business manager, petitioner led the union negotiating committee in collective bargaining negotiations with employers represented by the Boiler & Platework Erecting Contractors Association (C.A. App. 148, 152-153) and also determined which union members of Local 5 would be assigned to any particular construction project (C. A. App. 105, 158, 293).[4]

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[2]Petitioner served as business manager for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 5, AFL-CIO, representing approximately 1400 boilermakers who build and maintain power plants in the New York metropolitan area and a number of up-state counties.

[3]"C.A. App." refers to the appendix filed in the court of appeals. We are lodging a copy of the three-volume appendix with the Clerk of the Court.

[4]After a contractor was awarded a contract to build a boiler, he would contact the union and request petitioner to send a given number of boilermakers with particular expertise (*e.g.*,

In his dealings with the Treadwell Corporation on five different projects between 1964 and 1968, petitioner received more than $65,000 in cash payoffs from Robert Spitzer, vice-president of Treadwell (C.A. App. 160–175, 186, 214). Spitzer made the payments because he had been sent unproductive workers from Local 5 and did not want that to continue and because petitioner threatened to supply alcoholic workers if payments were not made to him (*id.* at 164–168, 171–175, 178–179, 186).

In 1968 Spitzer became Treadwell's president, and thereafter petitioner collected his payoffs from Burton Willis and John Johnson, both senior vice-presidents of Treadwell who were responsible for day-to-day operations on the company's construction jobs (C.A. App. 215, 293, 296, 305–309). In return for the payoffs, petitioner assured Willis that Treadwell would be assigned productive workers and would be free from jurisdictional disputes, work slowdowns and stoppages, and violence (C.A. App. 300–301).

Initially, Willis and Johnson attempted to conceal the payments by giving petitioner checks made out to firms whose names had been supplied by petitioner. Petitioner also supplied invoices describing services not actually rendered by the named firms (C.A. App. 295–300). Later, after petitioner complained that a portion of those payments had to be used to pay income tax for the firms, the Treadwell officers changed

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certified welders, journeymen) to the project site. These boilermakers would then go on the contractor's payroll for the duration of the project, after which they might be reassigned by petitioner to another contractor or project (C.A. App. 293-294).

to a method whereby they obtained cash by laundering checks made out to sham corporations. Willis then delivered cash payoffs directly to petitioner at prearranged meeting places (*id.* at 305–313). The cash payoffs, which amounted to a figure in excess of $500,000 (*id.* at 322), were made between 1971 and 1976 in connection with major boilers ("milestone contracts") erected for the Consolidated Edison Company at Astoria, Long Island, and for the Orange and Rockland Utility Co. at Bowline Point, as well as with smaller contracts (*id.* at 315–316). Eventually petitioner began making standard payoff demands linked to the type of job involved, *i.e.*, $50,000 for a major boiler, $25,000 for a condenser, $15,000 for a stack lining job, and $200 per week per shift on small jobs (*id.* at 315–320, 361).

Petitioner also received payments and other favors from Combustion Engineering Corporation when Combustion, an out-of-state contractor, experienced difficulties in getting business in New York and in getting productive workers assigned to it from Local 5. Combustion acceded to petitioner's demand that it hire his brother as a welding foreman and to his suggestions that it award subcontracts to certain companies recommended by petitioner (C.A. App. 515–516, 520–521, 526–527). Later, after petitioner observed to John Randall, the company's construction sales director, that the firm had been enjoying labor peace on a certain job and that he was in need of money, Randall gave petitioner a total of $3000, delivering envelopes containing $1000 to him on three separate occasions (*id.* at 540–541). Petitioner assured Randall that other

contractors were paying him off as well (*id.* at 542-543).

Petitioner also received cash payments from the Champion Construction Company beginning around 1966 (C.A. App. 110). During 1969 and 1970, George Koch, the president of Champion, paid petitioner approximately $30,000, for which he was promised "better men on the job," *i.e.*, Local 5 workers with 90%, as opposed to 40%, efficiency (*id.* at 118, 137).

In addition, between 1970 and 1972 petitioner received payoffs amounting to approximately $35,000 from Thomas O'Connor Company, Inc., of Massachusetts, in return for the assignment of productive workers to the company's New York jobs (C.A. App. 871-875).

Both the person who prepared petitioner's 1975 and 1976 federal income tax returns and an IRS agent testified that none of the above payoffs from contractors was reported as income on petitioner's tax returns (C.A. App. 702-713, 754, 760-761, 768-772).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the district court committed reversible error in its jury charge on the racketeering count (Count 1) by failing to instruct that petitioner could be convicted only if it were shown that he accepted the payments willfully and that they were made for the purpose of insuring labor peace and productivity. This argument is based on the assump-

tions (1) that the racketeering count could be sustained *only* by a jury finding that petitioner demanded or received payments unlawful under 29 U.S.C. 186(a)(4), as distinguished from payments unlawful under other subsections of 29 U.S.C. 186(a); (2) that the racketeering count could not be sustained by the payments found by the jury in convicting petitioner on Count 2, under instructions to consider petitioner's purpose in accepting payments proved under that count; (3) that petitioner had not consented to the absence of a willfulness instruction on the racketeering count; and (4) that despite the nature of petitioner's defense, he would be prejudiced by any failure to instruct on his intent in accepting the payments or the intent of those giving them to him. All of these assumptions are erroneous.

a. First, the error petitioner principally alleges (Pet. 9–10) in the charge on the racketeering count—the district court's instruction that the purpose of the payments concerned in the predicate offenses was unimportant—relates only to payments alleged as unlawful under 29 U.S.C. 186(a)(4). But the factual allegations of the racketeering count stated a violation with respect to payments unlawful under other subsections of Section 186(a) as well; the evidence of such payments was overwhelming and clearly sufficient to sustain a conviction on that count; and the jury instruction was not in error as to such payments.

Under 29 U.S.C. 186(b)(1), it is unlawful for a person to demand or receive any payment prohibited by 29 U.S.C. 186(a). The latter section specifies four categories of unlawful payments, and Section 186(b)(1)

can be violated with respect to any one of them.[5] As petitioner concedes (Pet. 8 n.1), Count 1 of the indictment—the racketeering count—does not specify any of them by number. By its reference to payments "for productive labor and labor peace" (Pet. App. A-12 through A-13), Count 1 charges petitioner with demanding and accepting payments unlawful under Section 186(a)(4). However, by its allegation that the labor organization for which petitioner acted as business manager had collective bargaining agreements with the employers alleged to have made payments to petitioner (Pet. App. A-11), Count 1 also charges violations involving payments unlawful under Sections 186(a)(1) and (2), which—unlike Section 186(a)(4)—re-

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[5] 29 U.S.C. 186(a)(1) - (2) and (a)(4) provides:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> (1) to any representative of any of *his employees* who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer, or employee thereof, *which represents, seeks to represent, or would admit to membership, any of the employees of such employer* who are employed in an industry affecting commerce; or
>
> * * * * *
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as *a representative of employees* or as such officer or employee of such labor organization. [Emphasis added.]

quire that the labor organization involved be either the actual or the potential representative of the employees of the employer making the payments, but do not require that the payment be made for the specific purpose of influencing petitioner in his actions as a union officer.[6] Since, as the district court informed the jury (C.A. App. 1186), petitioner had stipulated that Local 5 had collective bargaining agreements with the employers named in Count 1, the conviction on that count was proper so long as the jury found beyond a reasonable doubt that petitioner accepted at least two payments from any of the named employers. See 18 U.S.C. 1961(5). The evidence showed numerous payments from the named employers, so the conviction was clearly proper.

b. Even assuming that the jury had to find that petitioner demanded or received payments unlawful under Section 186(a)(4) in order to convict on the racketeering count and that the trial court erred in its instruction respecting such payments when charging on that count,[7] the error was not reversible because

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[6] Although petitioner now suggests (Pet. 4-5, but cf. Pet. 8) that the predicate offenses charged in the racketeering count were violations only with respect to Section 186(a)(4), his brief in the court of appeals, although not entirely clear, indicates his understanding that the predicate offenses involved payments unlawful under both Section 186(a)(1) and 186(a)(4) (App. Br. 10-13).

[7] We do not endorse the opinion of the court of appeals to the extent that it suggests (Pet. App. A-6) that an individual may be convicted under 29 U.S.C. 186(b)(1) of demanding or receiving payments unlawful under 29 U.S.C. 186(a)(4) without regard to the intent of *either* the person taking the payments or the person making them.

the conviction on Count 2 assures that the jury must have found that petitioner demanded or received payments that served the purpose delineated in Section 186(a)(4).[8] Count 2 alleged that Treadwell Corporation through its agent, Burton Willis, paid petitioner sums amounting to $94,000 over the period from June 8, 1974, through December 31, 1976.[9] In its charge on that count, the district court both noted that the government was urging that the payments "were made for the purpose of influencing [petitioner] in respect to his actions, decisions, and duties as business manager of Local 5" (C.A. App. 1195-1196) and instructed the jury that it must find that petitioner received the money with an intent to be influenced (C.A. App. 1198). The evidence of numerous payments from Treadwell through Willis was overwhelming and clearly sufficient to establish offenses that would sustain the conviction on the racketeering count.

c. There is no merit to petitioner's suggestion (Pet. 9) that the district court erred in its charge on the racketeering count by failing to instruct the jury that it must find that he received or demanded payments willfully. Petitioner concedes (Pet. 10) that his counsel may have "conceivably consented to" such an omission,

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[8]The jury's failure to convict petitioner on Count 3 may well reflect the fact that John Dapcich, a principal actor in the incidents there alleged (Pet. App. A-14), died before trial (C.A. App. 1149-1150).

[9]Payments by Willis to petitioner are among the predicate offenses alleged in the racketeering count (Pet. App. A-12).

and the record clearly shows such consent.[10] Petitioner's challenge here thus comes too late. Fed. R. Crim. P. 30.

d. Finally, in view of the fact that petitioner's defense consisted simply of denying that he had ever received or demanded any payments from employers (Tr. 1126–1139), and did not rest at all on any contention that the payments were not made with the requisite intent, the absence of instructions regarding the intent with which payments were made or received can hardly have prejudiced his case.

2. Relying on *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), petitioner contends (Pet. 14–17) that the district court should have held an evidentiary hearing to determine whether the IRS acted in good faith in obtaining, by administrative summons, records relating to the bank accounts of sham corporations that were used to generate cash for

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[10]The following colloquy occurred at trial (C.A. App. 1047–1048) (emphasis added):

> [The Court:] My present understanding of the law is that there is no element of wilfulness involved in either the RICO count or the Taft-Hartley counts.
>
> There is an element of knowledge, but I don't think it is an issue in this case. The evidence of the payments is not that somebody was surreptitiously putting money in his bank account when he didn't know they were doing it. If they find the payments were made, knowledge, even wilfulness would probably follow automatically. *Unless you specifically want me to charge on that aspect of it, I will simply ignore it.*
>
> Mr. Correri [Defense Counsel]: *I think it should be ignored.* I don't think there's anything in that area that [sic] [as] your Honor has indicated.

the payoffs made to petitioner by the Treadwell Corporation. The record reveals that petitioner's demand for an evidentiary hearing on his motion to suppress these and other documents did not focus on the point he now raises, and that, even assuming his demand could be construed to include a request for a hearing on the good faith of the IRS in issuing the summons, the request was properly denied.

a. On July 12, 1979, petitioner's counsel moved orally for a hearing on "the method or manner in which * * * documents which have been furnished to me, consisting of certain records of Treadwell, McCormick, and also so-called sham corporations, came into custody and control of the Organized Crime Force" (C.A. App. 1288–1289). The thrust of his remarks (C.A. App. 1289–1290, 1293–1294, 1297) and of his written motion filed two weeks later (C.A. App. 1338, 1346–1347) was that the Brooklyn Organized Crime Strike Force had been using the IRS as its own investigatory tool. He did not make the specific claim, now made (Pet. 14–17), that the IRS investigation had solely criminal prosecution purposes at the time the records in question were obtained by the IRS. Neither did he refer to the prosecutor's statement, on which he now relies (Pet. 15), that "this was a criminal investigation throughout; initially conducted by the criminal branch of the I.R.S., then conducted jointly with the Brooklyn Strike Force" (C.A. App. 1297), even though that statement was made some two weeks before petitioner filed his suppression motion.[11] Indeed, not until he

[11] Although petitioner did not cite the *LaSalle National Bank* case (C.A. App. 1337–1348), the lengthy affidavit filed by the

filed his brief in the court of appeals did petitioner rely on that statement and specifically focus on the nature of the IRS investigation alone.[12] In sum, petitioner did not clearly state to the district court the claim he now contends entitled him to an evidentiary hearing.

b. Even assuming the point was adequately raised in the district court, petitioner was properly denied an evidentiary hearing.

In *LaSalle*, an IRS agent who was conducting an investigation solely for the purpose of gathering evidence of criminal conduct, issued a summons, pursuant to 26 U.S.C. 7602, to obtain a taxpayer's bank records. This Court, holding that evidence of the agent's own intent was insufficient to establish that the summons was improperly issued, announced a two-pronged test for determining the propriety of such a summons. First, the summons must be issued before the matter is referred to the Department of Justice for criminal prosecution, since it is "at that point that * * * the criminal and civil aspects of a tax fraud case begin to diverge" (437 U.S. at 311). Second, even before that point a summons must be issued in "good faith pursuit"

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prosecutor to deny the principal charge of improper interagency cooperation also stated that there was "no basis for the defendant's claim that the strictures of *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), and related cases were violated" (C.A. App. 1354).

[12] At a hearing on August 23, 1979, petitioner raised what the district court characterized as "unfocused questions" concerning his suppression motion (Gov't Supp. App. A-11), but again failed to mention the prosecutor's statement on which he now relies to present the argument made here (*id.* at A-1 through A-11). "Gov't Supp. App." refers to a supplemental appendix filed by the government in the court of appeals.

of a congressionally authorized purpose (437 U.S. at 307-308, 318). In making this second determination, courts are required to take cognizance of the "inherently intertwined" criminal and civil elements of the tax system (437 U.S. at 309, 311). Thus, bad faith can be found only if it is demonstrated that the IRS abandoned any purpose of investigating civil tax liability with a view to collecting taxes or imposing civil tax liability and was concerned solely with gathering evidence for a criminal prosecution, freed from constraints such as warrant requirements or limitations on discovery in criminal proceedings. 437 U.S. at 316, 318.

The record reveals no basis for any *LaSalle* claim. The prosecutor, in his detailed affidavit filed in response to petitioner's suppression motion (C.A. App. 1349-1356), averred that the IRS made its decision to refer petitioner's case for criminal prosecution after the Strike Force had requested authorization for an open-ended grand jury on the basis of its own investigation (C.A. App. 1354), and he indicated by his chronology of events that this occurred after the records in question had been obtained by the IRS (*id.* at 1351-1354). He further stated that the IRS had obtained the bank records and checks in connection with the investigation of a taxpayer other than petitioner (*id.* at 1352). The sham bank account records uncovered in that inquiry "led [IRS agents] to" petitioner, and they later learned that the Strike Force was also interested in him (*id.* at 1352, 1354). Petitioner did not dispute the factual statements in the affidavit, but ar-

gued only that he might draw different conclusions (Gov't Supp. App. A-6).

The IRS investigation, both before and after petitioner's connection with the bank records came to light, was conducted by IRS special agents; but they were assisted by a regular revenue agent, and the preparation of a civil report following the criminal proceeding remained a possibility (C.A. App. 778, 781).[13] In sum, there was no investigation at all focused on petitioner at the time the records at issue were obtained, and petitioner did not allege that the investigation out of which the inquiry into his taxable income arose was solely criminal.

Nor is petitioner aided by the prosecutor's statement that "this was a criminal investigation throughout; initially conducted by the criminal branch of IRS, then conducted jointly with the Brooklyn Strike F[or]ce" (C.A. App. 1297). The prosecutor was there attempting to refute the charge of improper collusion between the IRS and the Strike Force; considered in context the statement means nothing more than that the IRS had been conducting its own independent criminal investigation before Strike Force attorneys ever learned of it. It does not impel the conclusion that criminal prosecution was the *sole* aim of the IRS investigation from the beginning or that any possibility of proceeding along civil lines had been rejected before the records were obtained.

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[13] Petitioner's suggestion (Pet. 16) that no revenue agent had been involved until five months before trial ignores the undisputed testimony of that agent that another revenue agent had been assigned to the case earlier and had left it because of illness (C.A. App. 779-780).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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